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(SPACE BELOW FOR FILING STAMP ONLY)

CITY ATTORNEY

2011 MAY 17 AM 10:42

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF LOS ANGELES

11 OMAR RODRIGUEZ; CINDY GUILLEN-
12 GOMEZ; STEVE KARAGIOSIAN;
13 ELFEGO RODRIGUEZ; AND JAMAL
14 CHILDS,

15 Plaintiffs,

16 -vs-

17 BURBANK POLICE DEPARTMENT; CITY
18 OF BURBANK; AND DOES 1 THROUGH
19 100, INCLUSIVE.

20 Defendants.

21 BURBANK POLICE DEPARTMENT; CITY
22 OF BURBANK,

23 Cross-Complainants,

24 -vs-

25 OMAR RODRIGUEZ, and Individual,

26 Cross- Defendant.

CASE NO.: BC 414 602

PLAINTIFF'S MOTION *IN LIMINE* NO. 5 TO
EXCLUDE DOCUMENTS, TESTIMONY AND
OTHER EVIDENCE REQUESTED BUT NOT
DISCLOSED DURING DISCOVERY

[Declaration of Steven M. Cischke re
Compliance with Local Rule 8.92 is filed
concurrently herewith]

Final Status Conference:

DATE: June 8, 2011

TIME: 9:00 a.m.

DEPT: 37

Assigned to: Hon. Joanne B. O'Donnell, Judge
Dept. 37

Complaint Filed: May 28, 2009

Trial Date: June 8, 2011

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 8, 2011, at 9:00 a.m., in Department 37 of the
3 Superior Court of the State of California, for the County of Los Angeles, Central District, located at
4 111 North Hill Street, Los Angeles, California, Plaintiff will move *in limine* for an order preventing
5 Defendant, its counsel and all witnesses from introducing any documents or other demonstrative
6 evidence and from making any statement, reference, innuendo, suggestion or implication regarding
7 any documents or testimony that was requested by Plaintiff but not produced by Defendant during
8 discovery, including but not limited to the Irma Moisa investigation, the Sergio Bent investigation,
9 and any other investigation.

10 This motion is brought on the grounds that the purpose of discovery is to prevent unfair
11 surprise at trial, and that it would be an unfair surprise to allow Defendant to introduce into evidence
12 documents and other evidence that was requested during discovery but which it failed to produce.

13 This motion will be based on this notice of motion, the Memorandum of Points and
14 Authorities served and filed herewith, on the records and file herein, and on such evidence as may be
15 presented at the hearing of this motion.

16
17 DATED: May 16, 2011

LAW OFFICES OF RHEUBAN & GRESEN

18
19 By: Steven M. Cischke
20 Steven M. Cischke
21 Attorneys for Plaintiff, Steve Karagiosian
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTORY STATEMENT**

3 One of the main purposes of discovery is to eliminate unfair surprise at trial. Davies v.
4 Superior Court (1984) 36 Cal.3d 291. Plaintiff is informed that Defendant has failed to produce: (a)
5 the Irma Moisa investigation regarding Omar Rodriguez, (b) The Sergio Bent investigation, (c) other
6 investigative reports. Defendant City of Burbank should not be permitted to use such information
7 and/or documents, or any other documents requested but not produced, to its advantage at trial after
8 failing to produce them during discovery. Furthermore, Defendant should be precluded from
9 offering any evidence (testimony or documents) as a counter to Plaintiff's evidence, where such
10 evidence has been withheld during discovery.

11
12 **II. EXCLUSION OF EVIDENCE IS AN APPROPRIATE REMEDY**
13 **TO PREVENT UNFAIR SURPRISE AT TRIAL**

14 Plaintiff presents this motion as a prophylactic measure to prevent unfair and prejudicial
15 surprises at trial. Exclusion of evidence, witnesses and testimony at trial is an appropriate remedy
16 for the willful failure of a party to provide discovery that was requested in a prior discovery demand.
17 (See Deeter v. Angus (1986) 179 Cal.App.3d 251, 254-255, in which evidence was excluded on the
18 ground that it was not produced in response to discovery requests.)

19 Further, Defendants cannot produce evidence at trial which has been previously objected to
20 on privilege (such as the so-called "*Pitchess*" peace officer privacy privilege embodied at Penal Code
21 § 832.7) or other grounds. (See A&M Records v. Heilman (1977) 75 Cal.App.3d 554, 566, in
22 which defendant was precluded from testifying about matters to which privilege was asserted in
23 discovery). The Courts have adhered to a strict policy that a party cannot refuse to produce
24 discovery on the grounds of privilege, and then suddenly waive that privilege at trial. Id. Such
25 behavior constitutes an unfair and unwarranted surprise.

26 In the present case, Defendant has failed to produce any investigative report, although they
27 have been requested by Plaintiff. In particular, Defendant has not produced any report or other
28 evidence of the Irma Moisa investigation regarding Omar Rodriguez, or any report or other evidence

1 regarding the investigation by Sergio Bent of Ford & Harrison. Thus, any evidence of such
2 investigations should be excluded. Likewise, evidence of any other documents requested but not
3 produced during discovery should be excluded.

4
5 **III. A MOTION IN LIMINE IS AN APPROPRIATE METHOD**
6 **TO EXCLUDE IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE**

7 Motions *in limine* are favored because they avoid disruption in the flow of trial and enable
8 the Court to make determinations about the admissibility of evidence out of the hearing of the jury
9 and before the inadmissible evidence can taint jury perceptions. Hyatt v. Sierra Boat Company
10 (1978) 79 Cal.App.3d 325, 337. Code of Civil Procedure § 128(a) authorizes any Court "(3) [t]o
11 provide for the orderly conduct of proceedings before it, or its officers" and "(8) [t]o amend and
12 control its process and orders so as to make them conform to law and justice."

13
14 **IV. CONCLUSION**

15 For the reasons discussed above, Plaintiff respectfully requests that this Court enter an order
16 generally preventing Defendants and their counsel from producing any documents or other
17 demonstrative evidence that has been requested but not produced, including but not limited to the
18 Irma Moisa investigation, the Sergio Bent investigation, and all other investigations that were
19 requested but not previously produced in discovery. Plaintiff should not be precluded, however,
20 from introducing documents and questioning witnesses about evidence contained in those categories,
21 even if Defendants have failed to produce it. Defendants cannot be surprised by documents and
22 evidence they already have in their possession.

23
24 DATED: May 16, 2011

LAW OFFICES OF RHEUBAN & GRESEN

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26 By: Steven M. Cischke
27 Steven M. Cischke
28 Attorneys for Plaintiff, Steve Karagiosian

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Lawrence A. Michaels, Esq.

March 31, 2011

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Please give us a call to discuss these. Thank you.

Very truly yours,

LAW OFFICES OF RHEUBAN & GRESEN

/S/

Steven M. Cischke